Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-83–12 OF 2013(W)
RAUS SHARIF PCA, ZULKEFLI MAKINUDDIN CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG AND JEFFREY TAN FCJJ
27 OCTOBER 2015

Contract — Breach — Allegation of — Tender — Three-party joint venture — Pre-tender agreement — Plaintiff promised work arising from project — Failure to honour promise — Whether agreement between plaintiff and first defendant only — Three party joint venture relationship not mentioned in agreement — Second and third defendants not parties to agreement — Whether first defendant breached pre-tender agreement — Whether second and third defendants bound by pre-tender agreement — Whether group of companies' functioned as single economic unit — Whether separate legal character reality

The appellant ('the plaintiff') was engaged in the business of building and civil engineering construction while the first and second respondents ('the first and second defendants') were involved in the business of building and civil engineering construction works with the first defendant being engaged principally as earthworks contractor. The plaintiff claimed that the first and second defendants were part of a group of companies managed and/or controlled by the Yip family with common and/or connected officers and shareholders. MMN Bina Sdn Bhd ('the third defendant') was a local bumiputra entity involved in the business of building construction. The second and third defendants were partners in a joint venture ('the AAY-MMN JV'). The plaintiff's claim arose out of a project known as 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the project'). The plaintiff claimed that the first and second defendants invited the plaintiff to jointly participate with them in a joint venture between the plaintiff, the first and second defendants (the three-party joint venture) to submit a tender to the Pahang Water Department in respect of the project. According to the plaintiff, upon the AAY-MMN JV securing the said project, the plaintiff would be awarded a portion of the works arising from the said project. Pursuant to the said joint venture, the plaintiff proceeded to prepare the tender. The third defendant held a majority of 70% shareholding and the second defendant held 30%. The said project was awarded to the AAY-MMN JV. The plaintiff contended that DW1 was the alter ego of the second and third defendants. Further, the plaintiff contended that having

regard to, inter alia, the relationship between the parties arising from the three-party joint venture and further upon the defendants having obtained the benefits of the plaintiff's input and efforts, the defendants, in particular the first and second defendants, were under the implied obligation not to act in any manner inconsistent with the three-party joint venture on the plaintiff's portion and to cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion. With regard to the third defendant, the plaintiff contends that the third defendant was bound by the pre-tender agreement on the plaintiff's portion on the basis that the AAY-MMN JV between the second and third defendants was in substance a partnership. The plaintiff claimed, inter alia, an order for specific performance of the said agreement for the plaintiff's portion. The High Court dismissed the claim. The Court of Appeal affirmed the High Court's decision. The issue that arose for the court's determination was whether in reality the group of companies' functioned as a single economic unit and that their separate legal character was not a reality.

Held, dismissing the appeal with costs:

(1) While it was pleaded that the defendants were 'part of a group of companies managed and/or controlled by the Yip family with common/connected officers and shareholders', there was no further assertion or claim arising therefrom in the way as submitted before by the plaintiff. It was also not pleaded that in the scheme of things the defendants and the third defendant were under the dominant control of Yip Kok Weng. There was also no allegation of fraud or equitable fraud or misrepresentation practised by the defendants upon the plaintiff during the discussion in the preparation of quotation or tender documents for the project (see paras 34 & 36).

(2) The thrust of the plaintiff claim against the defendants was that there was a joint venture as evidenced by the pre-tender agreement. In fact, the relief sought for by the plaintiff also showed such was the case. The plaintiff did not adduce any evidence of fraud, actual or equitable, or of any special circumstances that would have justified the lifting the veil of incorporation of the defendants. The first defendant was not awarded the subcontract works for the project. As such, in turn, the plaintiff could not be awarded the sub-subcontract works. Accordingly, the pre-tender agreement became void (see paras 40, 44, & 46).

[Bahasa Malaysia summary

Perayu ('plaintif') terlibat dalam perniagaan pembinaan bangunan dan kejuruteraan sivil manakala responden-responden pertama dan kedua ('defendan-defendan pertama dan kedua') terlibat dalam perniagaan kerja-kerja pembinaan bangunan dan kejuruteraan sivil dengan defendan pertama dilantik terutamanya sebagai kontraktor kerja tanah. Plaintif

A mendakwa bahawa defendan-defendan pertama dan kedua merupakan sebahagian daripada sekumpulan syarikat yang diurus dan/atau dikawal oleh keluarga Yip dengan pegawai-pegawai dan pemegang saham sama dan/atau berkaitan. MMN Bina Sdn Bhd ('defendan ketiga') ialah entiti bumiputra tempatan yang terlibat dalam perniagaan pembinaan bangunan.
B Defendan-defendan kedua dan ketiga ialah rakan kongsi dalam satu usahasama ('US AAY-MMN'). Tuntutan plaintif timbul daripada projek yang dikenali sebagai 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina Dan Menyiapkan Empangan Serta Kerja-Kerja Berkaitan di Sungai Chereh,
C Kuantan, Pahang Darul Makmur' ('projek itu'). Plaintif mendakwa bahawa defendan-defendan pertama dan kedua telah mempelawa plaintif untuk menyertai bersesama dengan mereka dalam usahasama antara plaintif, defendan-defendan pertama dan kedua (usahasama tiga pihak) untuk mengemukakan tender kepada Jabatan Air Pahang berkaitan projek itu.
D Menurut plaintif, setelah US AAY-MMN memperoleh projek itu, plaintif akan diawardkan sebahagian kerja yang timbul daripada projek tersebut. Berikutan usahasama tersebut, plaintif seterusnya telah menyediakan tender itu. Defendan ketiga memegang majoriti 70% pegangan saham dan defendan kedua memegang 30%. Projek tersebut telah diawardkan kepada US
E AAY-MMN. Plaintif berhujah bahawa DW1 merupakan *alter ego* defendan-defendan kedua dan ketiga. Selanjutnya, plaintif berhujah bahawa berdasarkan kepada, antara lain, hubungan antara pihak-pihak yang timbul daripada usahasama tiga pihak dan selanjutnya setelah defendan-defendan memperoleh manfaat berhubung input dan usaha plaintif,
F defendan-defendan, khususnya defendan-defendan pertama dan kedua, adalah di bawah tanggungan tersirat untuk tidak bertindak dalam cara yang tidak konsisten dengan usahasama tiga pihak berhubung bahagian plaintif dan untuk bekerjasama dan mengambil segala langkah-langkah yang perlu untuk memastikan bahawa plaintif diawardkan bahagian plaintif. Berhubung
G defendan ketiga, plaintif berhujah bahawa defendan ketiga terikat dengan perjanjian pra-tender berhubung bahagian plaintif berasaskan bahawa US AAY-MMN antara defendan-defendan kedua dan ketiga pada asasnya suatu perkongsian. Plaintif mendakwa, antara lain, suatu perintah untuk pelaksanaan spesifik perjanjian tersebut bagi bahagian plaintif. Mahkamah
H Tinggi telah menolak tuntutan itu. Mahkamah Rayuan telah mengesahkan keputusan Mahkamah Tinggi. Isu yang timbul untuk penentuan mahkamah adalah sama ada pada hakikatnya kumpulan syarikat berfungsi sebagai satu unit ekonomi dan bahawa ciri-ciri undang-undang yang berasingan mereka bukan suatu realiti.

I **Diputuskan**, menolak rayuan dengan kos:

(1) Apabila ia dipli bahawa defendan-defendan ialah 'part of a group of companies managed and/or controlled by the Yip family with common/connected officers and shareholders', tiada penegasan atau

tuntutan selanjutnya yang timbul dalam cara yang dikemukakan sebelumnya oleh plaintif. Ia juga tidak dipli bahawa dalam skim perkara defendan-defendan dan defendan ketiga berada dalam kawalan dominan Yip Kok Weng. Tiada juga dakwaan fraud atau fraud yang saksama atau salah gambaran yang diamalkan oleh defendan-defendan ke atas plaintif sepanjang perbincangan dalam penyediaan sebut harga atau dokumen-dokumen tender untuk projek itu (lihat perenggan 34 & 36).

(2) Inti pati tuntutan plaintif terhadap defendan adalah bahawa terdapat usahasama sepertimana dibuktikan oleh perjanjian pra-tender. Bahkan, relief yang dipohon oleh plaintif juga menunjukkan kes sedemikian. Plaintif tidak mengemukakan apa-apa keterangan berhubung fraud, sebenar atau saksama, atau tentang apa-apa keadaan istimewa yang mewajarkan mengangkat tirai pemerbadanan defendan-defendan. Defendan pertama tidak diawardkan kerja subkontrak untuk projek itu. Oleh demikian, sebaliknya, plaintif tidak boleh diawardkan kerja subkontrak. Oleh demikian, perjanjian pra-tender menjadi tidak sah (lihat perenggan 40, 44, & 46).]

Notes

For a case on allegation of, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3491.

Cases referred to

Anjalal Anmal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)
Esso Petroleum Co Ltd v SouthPort Corpn [1956] AC 218, HC (refd)
Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)
Joo Chin Kia v Loh Seng Tek [1987] 1 CLJ 194, HC (refd)
KEP Mohamed Ali v KEP Mohamad Ismail [1981] 2 MLJ 10, FC (refd)
Lee Kim Luang v Lee Shiah Yee [1988] 1 MLJ 193 (refd)
Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd [1980] 2 MLJ 182, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Solid Investments Ltd v Alcatel Lucent (Malaysia) Sdn Bhd [2014] 3 MLJ 785; [2014] 3 CLJ 73, FC (refd)

Appeal from: Civil Appeal No W-02–561 of 2010 (Court of Appeal, Putrajaya)

Cyrus Das (Michael Chow, CH Cheong with him) (Michael Chow Advocates & Solicitors) for the appellants.
Nahendran Navaratnam (Alex Tan, Dennis Goh with him) (Wong Kian Kheong) for the first respondent.

Justin Voon (Alvin Lai with him) (Justin Voon Chooi & Wing) for the second respondent.

Richard Malanjum CJ (Sabah and Sarawak):

INTRODUCTION

[1] On 10 December 2013, this court granted leave to the appellant, the plaintiff in the action, to appeal on the following questions:

(a) where Company A and Company B are family companies belonging to the same family, whether it is permissible for Company A (the first respondent/first defendant) to escape its contractual obligation to sub-contract construction works to the appellant/plaintiff by claiming that Company B (the second respondent/second defendant) and not itself was awarded the main sub-contract?

(b) whether the separate legal character of limited companies can be recognised where it is used to avoid or frustrate legal obligations?

(c) whether it is appropriate to lift the corporate veil in a group of family companies and treat them as a single business unit where one company in the group seeks to evade its contractual obligation by relying on the actions of another in the group?

(d) whether it is appropriate to treat the family companies in the group as a single business unit where a dominant individual is its alter ego and is seeking to perform the contract under Company B rather than Company A thereby denying the appellant/plaintiff its contractual rights?

(e) where Company A and Company B (the second respondent/second defendant) are in substance a single business unit, whether they are bound by the principles of good faith and fair dealing to honour the obligation entered into by Company A with the appellant/plaintiff?

[2] This appeal is only against the first and second respondents who were the first and second defendants in the action. The appeal against MMN Bina Sdn Bhd, the third defendant in the action, was discontinued at the Court of Appeal. As such, any claim against the third defendant is no longer relevant before us.

[3] For ease of reference, in this judgment, the appellant will be referred to as the plaintiff while the first and second respondents will be collectively referred to as the defendants and/or as the first and second defendants, where the context so require. For convenience, MMN Bina Sdn Bhd will be referred to as the third defendant.

[4] The plaintiff is dissatisfied with the dismissal of its claim against the first, second and third defendants by the High Court which was upheld by the Court of Appeal. The counterclaim by the first defendant against the plaintiff was allowed by the High Court but on appeal was reversed by the Court of Appeal. There is no appeal against the dismissal of the counterclaim.

BACKGROUND FACTS

[5] The plaintiff is a company incorporated under the Companies Act 1960 ('the Act'). It is engaged in the business of building and civil engineering construction.

[6] The first and second defendants are companies incorporated under the Act. Both are also involved in the same activities as the plaintiff but with the first defendant principally engaged in earthworks.

[7] The third defendant is also a company registered under the Act but with bumiputera status. It too is involved in the business of building construction.

[8] There was a project of the Jabatan Bekalan Air Negeri Pahang Darul Makmur, which was known as the 'Rancangan Bekalan Air Greater Kuantan Fasa II-Pakej 3 Membina dan Menyiapkan Empangan serta Kerja-kerja berkaitan di Sungai Chereh, Kuantan, Pahang Darul Makmur' ('the project').

[9] The second and third defendants teamed up to form a joint venture known as AAY-MMN joint venture ('the AAY-MMN joint venture') in order to tender for the project.

[10] After completion of the tender documents, AAY-MMN JV submitted its bid to the Jabatan Bekalan Air Negeri Pahang Darul Makmur in the contract sum of RM69,300,000. It was successful in its bid. As to who prepared the tender documents and on what terms, they were the issues between the plaintiff and the defendants. However they are not material in this appeal. They involved factual findings and the courts below had already made these findings.

THE PLAINTIFF'S CASE

[11] It was the plaintiff's case that owing to its experience in the field of engineering and construction work it was invited by the defendants to jointly participate with them in submitting a tender for the project. The plaintiff dealt with the defendants through Ng Kai Wai and Yip Kok Weng.

[12] The plaintiff asserted in its amended statement of claim that such understanding amongst them resulted in the formation of a joint venture

between them as evidenced by the pre-tender agreement it entered with the first defendant.

[13] The plaintiff claimed that under the joint venture it was understood that it would be awarded the sub-sub contract works in the project involving a portion described in the amended statement of claim as the 'agreement on the plaintiff's portion'.

[14] Meanwhile, cl F of the pre-tender agreement provided that it would be void in the event of the first defendant failing to secure the main sub-contract works in the project.

[15] And as indicated above, the successful bidder for the project was AAY-MMN joint venture which was not the same as the joint venture alluded to by the plaintiff in its amended statement of claim.

[16] In its amended statement of claim, the plaintiff complained that 'Not with standing the award of the said project to the AAY-MMN joint venture and despite various reminders and demands by the plaintiff, the defendants have in breach of the aforesaid understanding reached in respect of the said joint venture including, in particular, the agreement on the plaintiff's portion, failed and/or refused to award or cause to be awarded to the plaintiff the plaintiff's portion'.

[17] However, from the evidence adduced, the first defendant was not awarded the main sub-contract work by AAY-MMN joint venture due to disagreement on the pricing. Hence, the plaintiff was not given the sub-sub contract works.

[18] The plaintiff also claimed in its amended statement of claim that 'Further and by reason of the above, the plaintiff will contend that the information and documents including, in particular, the work program and technical schedules produced in the course of preparing for and/or forming part of the said tender that was submitted are property of the plaintiff.'

[19] And the plaintiff prayed for the following relief:

(a) a declaration that the joint venture was constituted and continues to subsist between the plaintiff and the first and second defendants;

(b) a declaration that the defendants through the AAY-MMN joint venture hold the plaintiff's portion as constructive trustees for the plaintiff;

(c) an account of the profits made by the defendants from the plaintiff's portion;

(d) a declaration that the defendants through the AAY-MMN joint venture an order for specific performance of the said agreement for the plaintiff's portion as evidenced, inter alia, the pre-tender agreement;

(e) an order that the defendants pay to the plaintiff the profits found to have been made by them on the taking of account;

(f) damages in lieu of and/or in addition to the order for specific performance to be assessed against the defendants;

(g) a declaration that the information and documents including, in particular, the work program and technical schedules, produced in the course of and/or forming part of the said tender submitted by the AAY-MMN joint venture are property of the plaintiff; and

(h) such other orders or directions as this honourable court deems just and fit'.

DEFENDANTS' CASE

[20] Basically, the first and second defendants denied being related companies as defined under the Act or that they had common directors. They also denied ever inviting the plaintiff into a joint venture.

[21] The second and third defendants stated that through AAY-MMN joint venture they orally agreed to appoint the first defendant as a sub-contractor for the project if they succeeded in the bid and provided the terms were agreed upon including the pricing.

[22] The first defendant admitted to have requested the plaintiff to submit a quotation for the project. And it was also agreed that in the event the first defendant securing the sub-contract work in the project the plaintiff would be appointed to do the structural works subject to agreed pricing which the plaintiff should be prepared to rationalise in order to have competitive rates. However, when requested to do so the plaintiff was unwilling to rationalise the rates and pricings for those works in the project.

[23] As a result the first defendant was not awarded the main sub-contract works in the project by AAY-MMN joint venture. Instead the second defendant was given the main sub-contract works. In turn, cl F of the pre-tender agreement applied thereby making the agreement void.

BEFORE THE HIGH COURT

[24] The learned High Court trial judge heard the respective versions of the plaintiff and the defendants. In dismissing the claim of the plaintiff the learned

A High Court trial judge made certain findings of fact and ruled, inter alia,:

(a) that the claim of the plaintiff was primarily based on the pre-tender agreement containing terms including cl F;

B (b) that AAY-MMN joint venture did offer the sub-contract works in the project to the first defendant at the cost of RM63m. The first defendant in turn requested the plaintiff to reduce the amount in their quotation to RM36m. The plaintiff refused to do so;

C (c) that since the first defendant did not get the sub-contract works in the project from AAY-MMN joint venture clause F came into effect which made the pre-tender agreement void;

(d) that accordingly the plaintiff had no cause of action against the defendants; and

D (e) that the counterclaim of the first defendant should be allowed. The first defendant suffered loss and damage after it could not accept the offer of sub-contract by AAY-MMN joint venture due to the refusal by the plaintiff to review the pricings it had given.

E BEFORE THE COURT OF APPEAL

[25] The Court of Appeal did not find the findings of fact by the learned High Court trial judge perverse. It held that being 'a trier of fact, the findings of the learned trial judge deserve great respect. Nothing is demonstrated before us to justify our intervention either in the learned trial judge's findings of fact F or her assessment or appreciation of the evidence'.

[26] The Court of Appeal also held:

G (a) that it 'agree with the findings of the learned trial judge that from the evidence proffered, there exists only the pre-tender agreement and the said pre-tender agreement is the culmination of the negotiation between the plaintiff and the first defendant';

H (b) that 'the essence of the plaintiff's argument is simply that the first defendant was in breach of the pre-tender agreement and this is further made clear from the written submissions submitted to this court for purposes of this appeal';

I (c) that 'on the evidence, we find that the learned trial judge had rightly concluded that the first defendant was not awarded the project but the AAY-MMN joint venture was. And as provided in cl F of the pre-tender agreement, the relationship between the plaintiff and first defendant comes to an end if and when the first defendant is not awarded the project and for that reason the pre-tender agreement no longer subsist. The plaintiff then has no cause of action against the first defendant';

(d) that it found no justifiable ground to disturb the specific finding that of the learned High Court trial judge that 'she accepted the evidence of DW1 and considered that 'DW1 could not deal with the plaintiff as representative of the second defendant in view of the fact that the second defendant is a partner of the AAY-MMN joint venture and any decision if made on behalf of the second defendant would have to take into account the third defendant who is the majority shareholder and the controlling partner in the AAY-MMN joint venture';

(e) that 'the invitation to participate in the joint venture to submit a tender to the Jabatan Bekalan Air Negeri Pahang in respect of the project on its own does not create a contractual relationship between the plaintiff and the first and second defendants. At most it is an invitation for a discussion and negotiation which culminates in the preparation and signing of the pre-tender agreement between the plaintiff and the first defendant'; and

(f) that the learned High Court trial judge did not err in accepting the evidence of DW1 (Yip Kok Weng) that 'except for the pre tender agreement, there was no other understanding, representation or agreement between the plaintiff and the first defendant. There was no joint venture, partnership or any understanding between the plaintiff and the first and second defendants'.

BEFORE THIS COURT

[27] Learned counsel for the plaintiff summarised the leave questions to one legal issue, that is, whether contractual obligations could be frustrated or avoided by shifting responsibility from one company to another within a group of companies belonging to the same family. He elaborated by submitting that the 'question is whether in reality the group of companies' function as a single economic unit and that their separate legal character is not a reality'.

[28] Learned counsel for the plaintiff further submitted:

(a) that while the first defendant was not awarded the sub-contract works, in fact it performed the works for the second defendant thus circumventing its contractual obligations to the plaintiff. The managing director of the first defendant, Yip Kok Weng was appointed the project manager of the project while another director, Yip Kok Wai was assigned full time as a site manager of the project;

(b) that the contractual obligations were avoided by the first defendant due to the controlling position of the Yip brothers in the management of the defendants;

(c) that Yip Kok Weng was the alter ego of the defendants;

(d) that the corporate veil should be lifted as a matter of justice where the separate legal personality of a company has been abused to avoid legal liabilities;

(e) that the Court of Appeal failed 'to see the reality of the use of the two family companies as a device to avoid contractual liabilities. It was specifically pleaded by the appellant in its amended statement of claim that the two respondent companies are 'part of a group of companies managed and/or controlled by the Yip family with common/connected officers and shareholders';

(f) that the courts below failed 'to attach any significance to the fact that the JV entity – AAY-MMN JV – operated from the same business address' as the defendants, 'that the appointment of Yip Kok Weng as the project Director' of the second defendant was issued by the JV entity and 'that the JV entity was controlled by the Yip family';

(g) that in 'the final marked-up tender award the amended price in the pre-tender agreement for the portion of the works to be done by the plaintiff at RM37.9m was very workable';

(h) that in his supplementary note subsequently submitted by learned counsel for the plaintiff, it was contended that the sub-contract sum of RM63,000,000 was 'doable'. The sub-contract could have been awarded to the first defendant. Yet the first defendant offered a sub-sub contract sum of only RM28,000,000 or RM32,000,000 knowing well that such sum was not acceptable by the plaintiff. The first defendant was therefore in breach of the pre-tender agreement; and

(i) that the 'rationalisation' adverted to by the first defendant was nothing but a wholesale reduction of the agreed sub-sub contract sum.

[29] In response learned counsel for the first defendant submitted:

(a) that this was 'a simple case of an intended contractual relationship which did not come to fruition' and it was cut short by the failure of a material condition;

(b) that it was the 'plaintiff's suggestion that if the veil of the second defendant is lifted one would see the face of DW1. In this case the evidence adduced indicated insufficient evidence to support such contention';

(c) that 'since the crux of the complaint is that the first defendant directed the will of the second and/or the third defendants in causing them to refrain from awarding the plaintiff's portion to the plaintiff, the plaintiff must prove that DW1 is not only capable of but indeed actually did direct the will of the joint venture. The evidence clearly shows that DW1 was incapable of controlling and directing the will of the joint venture';

(d) that 'the real reason for the failure of the award of the project to the first defendant' was due to pricing disagreement between the first defendant and the joint venture. It is a question of fact and not of law;

(e) that the 'lifting the corporate veil is well settled and acknowledged to be dependent on the particular facts and circumstances of each case'. In other words there must be '*special circumstances* needed to lift the veil in order to reveal the true actors hiding behind the veil of incorporation' thereby insulating themselves from fraudulent or inequitable conduct. As such again it is a question of fact;

(f) that in this case 'there is no evidence of actual fraud at common law or fraud in equity.' As such 'the special circumstances simply do not exist for the corporate veil to be lifted in this case';

(g) that this court 'ought not to make determinations of fact especially in the face of the Court of Appeal having affirmed the primary findings of fact of the High Court as regards the factual circumstances'; and

(h) that in answer to the supplementary note of learned counsel for the plaintiff it was submitted that the plaintiff expected the first defendant to reduce its profit margin without affecting its own margin.

[30] Meanwhile, learned counsel for the second defendant contended:

(a) that on 'a plain reading of the amended statement of claim' shows that this issue of 'piercing the corporate veil' was never the thrust of the plaintiff's case;

(b) that the thrust of the plaintiff's case as evinced from the amended statement of claim is something entirely different ie the existence of a three party joint venture' and 'the breach of the same by all three defendants'. But such allegation by the plaintiff failed since PW1 the director of the plaintiff admitted that there was no such three party joint venture;

(c) that the plaintiff was fully aware at all material times that the first defendant and the second defendant were family companies where the directors/shareholders had family ties. And in its pleading the plaintiff acknowledged that the first and second defendants were separate legal entities contrary to its subsequent submission that the defendants were one and the same companies controlled by Yip Kok Weng. Such issue was not pleaded in the first place. It was also not pleaded that Yip Kok Weng was the dominant person in managing the defendants as well as the third defendant;

(d) that in signing the pre-tender agreement only with the first defendant it was an indication that the plaintiff recognised that the first and second defendants are separate entities;

(e) that it was not pleaded and there was no evidence adduced in this case to establish actual fraud or fraud in equity so as to justify the lifting of the corporate veil of the defendants;

(f) that even though the plaintiff pleaded that the first and second defendants were 'managed and/or controlled by the Yip family' there was no further pleading that the plaintiff was misled, defrauded or that there was a sham/cloak/device purportedly practised by the first and second defendants;

(g) that the courts below found as a fact that the plaintiff failed to prove its pleaded case based on its claim that a third party joint venture between it and the defendants existed;

(h) that the plea involving the third defendant is no longer relevant in this appeal. The plaintiff discontinued its appeal against the third defendant; and

(i) that it was not the pleaded case of the plaintiff that even though the second defendant was awarded the sub-contract works of the project the works were actually performed by the first defendant on behalf of the second defendant.

DECISION OF THIS COURT

[31] Before we specifically address the questions posed for our consideration it is pertinent to first deal with the pleading issue in view of the submissions of learned counsel for the defendants.

[32] From a perusal of the amended statement of claim, it is obvious that the plaintiff premised its claim only on the assertions that there was a joint venture between the plaintiff and the defendants that was quite different from the AAY-MMN joint venture between the second defendant and the third defendant.

[33] And it was also pleaded that arising from the joint venture the portion of the works in the project had been earmarked for the plaintiff. It was described in the amended statement of claim as 'the agreement on the plaintiff's portion'. The plaintiff asserted that the pre-tender agreement executed between it and the first defendant evidenced such agreement on the plaintiff's portion.

[34] While it was pleaded that the defendants were 'part of a group of companies managed and/or controlled by the Yip family with common/connected officers and shareholders', there is no further assertion or

claim arising therefrom in the way as submitted before us by learned counsel for the plaintiff. A

[35] Indeed there was no allegation in the amended statement of claim that the plaintiff was not awarded the sub-sub contract works as a result of manipulation or the abuse of the 'single' entity of the defendants. B

[36] It is also not pleaded that in the scheme of things the defendants and the third defendant were under the dominant control of Yip Kok Weng. There was also no allegation in the amended statement of claim of fraud or equitable fraud or misrepresentation practised by the defendants upon the plaintiff during the discussion in the preparation of quotation or tender documents for the project. C

[37] Yet in his submission learned counsel for the plaintiff urged us, inter alia, to consider lifting the corporate veil of the defendants. Unfortunately, we find nothing in the amended statement of claim that alleged the defendants committed fraud, actual or equitable fraud upon the plaintiff. There was also no allegation that the defendants misled the plaintiff. D

[38] At best the plaintiff merely pleaded that the first and second defendants: E

(a) 'are ... part of a group of companies managed and or controlled by the Yip family with common and or connected officers and shareholders'; and

(b) that 'having regard to the relationship inter-se the parties arising from the joint venture and further upon the defendants having, with knowledge and encouragement, obtained the benefits of the plaintiff's input and efforts as set out above, the defendants, in particular the first and second defendants, were under the following implied obligations towards the plaintiff in relation to the plaintiff's portion: F G

    (i) not to act in any manner inconsistent with the agreement on the plaintiff's portion;

    (ii) to, inter alia, cooperate and take all necessary steps to ensure that the plaintiff be awarded the plaintiff's portion pursuant to the agreement on the plaintiff's portion'. H

[39] With respect, we do not think the foregoing allegations as pleaded are sufficient as a plea for fraud or equitable fraud or to indicate special circumstances upon which on evidence adduced would justify the lifting of corporate veil of the defendants. I

[40] In fact, as found by the courts below and which we are inclined to agree that the thrust of the plaintiff claim against the defendants is that there was a

joint venture as evidenced by the pre-tender agreement. In fact the relief sought for by the plaintiff also show such is the case.

[41] The courts below also held and which we are also inclined to agree that the alleged joint venture did not exist and that the actual claim of the plaintiff was premised on the pre-tender agreement.

[42] Now, it is trite law that the plaintiff is bound by its own pleadings (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Anjalal Anmal & Anor v Abdul Kareem* [1969] 1 MLJ 22; *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); *Joo Chin Kia v Loh Seng Tek* [1987] 1 CLJ 194; *KEP Mohamed Ali v KEP Mohamad Ismail* [1981] 2 MLJ 10 (FC)). The plaintiff is not permitted to improve its pleading in any other manner other than by way of an application to amend. Otherwise it would be unfair and prejudicial to the defendants if the plaintiff could now be allowed to raise an issue that was not within the contemplation of the parties in the first place (see *Esso Petroleum Co Ltd v SouthPort Corpn* [1956] AC 218; *Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182 (FC)).

[43] Learned counsel for the plaintiff urged us to lift the veil of incorporation of the defendants in order to do justice. Learned counsel submitted that only by doing so would unmask DW1, that is Yip Kok Weng, to be the real actor behind the scheme.

[44] With respect, we are in agreement with the finding of the Court of Appeal that the plaintiff did not adduce any evidence of fraud, actual or equitable, or of any special circumstances that would have justified the lifting the veil of incorporation of the defendants.

[45] It is settled law that 'there must be evidence either of actual fraud or some conduct amounting to fraud in equity to justify the lifting of corporate veil' (see *Solid Investments Ltd v Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 MLJ 785; [2014] 3 CLJ 73). Further, in a plea of fraud mere allegations is not sufficient. There must be particulars give (see *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193).

[46] As stated above it is not in dispute that the first defendant was not awarded the sub-contract works for the project. As such, in turn, the plaintiff could not be awarded the sub-sub contract works. Accordingly, the pre-tender agreement became void pursuant to clause F thereof.

[47] Accordingly, we agree with the submission of learned counsel for the defendants that based on pleadings issue alone the plaintiff has no basis to seek

for the lifting of the corporate veil of the defendants or to insist that there was an abuse by the defendants of the concept of corporate separate entities.

[48] In his supplementary note tendered after the completion of the hearing of this appeal, learned counsel for the plaintiff further submitted that the first defendant was in breach of the pre-tender agreement.

[49] With respect in its pleadings, the plaintiff only alleged that the breach was on the joint venture. Since we agree with the courts below that there was in fact no such joint venture, the issue of breach did not arise. And assuming the breach was related to the pre-tender agreement, the evidence adduced disclosed the reason for the failure of the first defendant to get the sub-contract works in the project. As a result, cl F applied, thereby making the pre-tender agreement void.

[50] For the above reasons, we do not think it is necessary for us to answer the questions posed. Hence, we decline to do so. On the factual matrix of this case and based on the pleaded case of the plaintiff our answers to those questions would serve no purpose to the plaintiff. It would then be purely an academic exercise and this court is not expected to conduct such a feat in this case.

[51] In the upshot this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor